

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914

No. 78

JAMES M. HULL, JR., TRUSTEE,

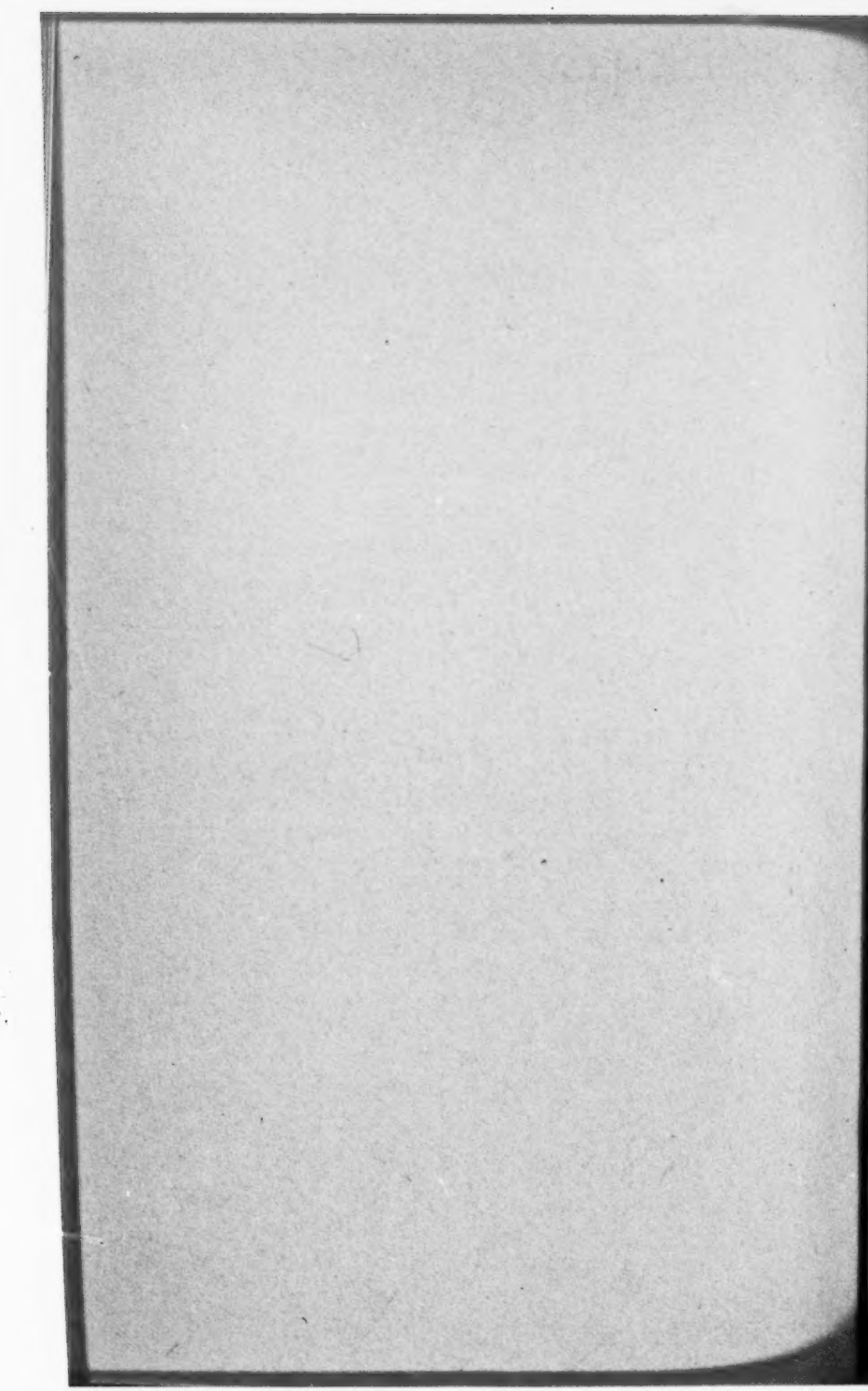
vs.

Mrs. M. J. DICKS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

FILED DECEMBER 18, 1912.

(23,463)



(23,463)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 400.

JAMES M. HULL, JR., TRUSTEE.

vs.

Mrs. M. J. DICKS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

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Original. Print

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Number 2398.

United States Circuit Court of Appeals, Fifth Circuit.

JAMES M. HULL, JR., Trustee, Petitioner,
versus
Mrs. M. J. DICKS, Respondent.

Before Pardee, Circuit Judge, and Newman and Meek, District
Judges.

This is a petition to superintend and revise a judgment of the District Court for the Southern District of Georgia sitting as a Court of Bankruptcy, ordering payment by the trustee of a year's support set apart by the Court of Ordinary to the widow and minor children of a bankrupt out of money in the hands of a trustee in bankruptcy where the bankrupt died after his adjudication, and after the trustee of his estate in bankruptcy had qualified and taken possession of the entire estate of the bankrupt. From the transcript of the record it appears:

First. On January 3d, 1912, an involuntary petition in bankruptcy was filed against L. K. Dicks, a resident of Richmond County, Georgia, and he was on January 23d, 1912, adjudicated a bankrupt. James M. Hull, Jr., was elected trustee of the bankrupt estate of Dicks, and gave bond on February 5th, 1912, and immediately took possession of such estate.

Second. On February 28th, 1912, L. K. Dicks died, leaving a widow and four minor children.

Third. Subsequent to the death of L. K. Dicks, his widow Mary J. Dicks made application to the Court of Ordinary of Richmond County, Georgia, to have set apart to her and said minor children a year's support from the estate of her said husband. This
2 resulted in the setting apart of a year's support by the said Court of Ordinary, as follows:

"Twenty-five hundred dollars (\$2,500.00) to be paid out of the cash on hand with J. M. Hull, Jr., Trustee in bankruptcy, and the stock of goods located at 907 Broad Street, in the store formerly occupied by L. K. Dicks, now also in the custody and control of the said J. M. Hull, Jr., Trustee, all within the city of Augusta and county aforesaid."

The statutory requirements were complied with in this proceeding, including the publication of citation, but said trustee was not made a party thereto.

Fourth. Thereupon said Mary J. Dicks brought her petition to Hon. Joseph Ganahl, Referee in Bankruptcy in Richmond County, setting out the above facts, and praying that the said J. M. Hull, Jr., Trustee, be directed to pay her "the sum of \$2,500.00 out of said estate as per the order from the Hon. Alexander R. Walton, Ordinary of Richmond County, Georgia." The Referee declined to

grant such order. This judgment was reviewed by Hon. Emory Speer, Judge of the District Court for the Southern District of Georgia, and reversed, and the trustee ordered to pay the allowance. The trustee seeks to have this last judgment reversed by a petition to this Court to superintend and revise.

Upon this state of facts, this Court desiring the instruction of the Supreme Court of the United States that it may properly decide the several questions of law presented on the record, does hereby certify to said Supreme Court the following question:

Where a resident citizen of Georgia has been duly adjudicated a bankrupt and dies after such adjudication and after the appointment qualification and partial administration of the trustee is the estate vested in the trustee under section 70 of the bankruptcy law of 1898 chargeable under section 8 of the same law, or otherwise, with the allowance for a year's support of the widow and minor children, as provided in the laws of Georgia?

It is therefore ordered that a copy of this certificate, under the seal of the Court, be filed with the Clerk of the Supreme Court at Washington.

Witness our hands this 22d day of November, 1912.

(Signed)

DON A. PARDEE,

(Signed)

WM. T. NEWMAN,

(Signed)

EDWARD R. MEEK,

*Judges of the United States Circuit Court of Appeals
for the Fifth Circuit, Sitting in said Cause.*

4

UNITED STATES OF AMERICA,

Fifth Judicial Circuit, ss:

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of James M. Hull, Jr., Trustee, Petitioner, versus Mrs. M. J. Dicks, Respondent, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the City of New Orleans, Louisiana, this 23d day of November, A. D. 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,

*Clerk of the United States Circuit Court of
Appeals for the Fifth Circuit.*

5

[Endorsed:] No. 2398. United States Circuit Court of Appeals for the Fifth Circuit. James M. Hull, Jr., Trustee, Petitioner, vs. Mrs. M. J. Dicks. Certificate.

Endorsed on cover: File No. 23,463. U. S. Circuit Court Appeals, 5th Circuit. Term No. 400. James M. Hull, Jr., trustee, vs. Mrs. M. J. Dicks. (Certificate.) Filed December 18th, 1912. File No. 23,463.

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 400.

James M. Hull, Jr., Trustee	}	Certificate from the
Vs.		United States Circuit
Mrs. M. J. Dicks	}	Court of Appeals for
		the Fifth Circuit.

BRIEF OF WM. H. BARRETT, ATTORNEY
FOR JAMES M. HULL, JR., TRUSTEE,
APPELLANT.

"Where a resident citizen of Georgia has been duly adjudicated a bankrupt and dies **after such adjudication and after the appointment, qualification, and partial administration of the trustee**, is the estate vested in the trustee under section 70 of the bankruptcy, law of 1898 chargeable under section 8 of the same law, or otherwise, with the allowance for a year's support of the widow and minor children, as provided in the laws of Georgia?"

This is the sole question.

YEAR'S SUPPORT—WHAT IT IS

"Year's support" is synonymous with "allowance" in section 8 of the Bankrupt Act but is clearly distinguished from "dower" as hereinafter more fully shown.

"Year's support" is authorized and described in section 4041 of the Civil Code of Georgia of 1910, as follows:

"Year's support to family. Among the necessary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided, is the provision for the support of the family, to be ascertained as follows: Upon the death of any person, testate or intestate, leaving an estate solvent or insolvent, and leaving a widow, or a widow and minor child or children, or minor child or children only, it shall be the duty of the ordinary, on the application of the widow, or the guardian of the child or children, or any other person in their behalf, on notice to the representative of the estate (if there is one, and if none, without notice) to appoint five discreet appraisers; and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of twelve months from the date of administration, in case there be administration on the estate, to be estimated according to the circumstances and standing of the family previously to the death of the testator or intestate, and keeping in view also the solvency of the estate. If there be a widow, the appraisers shall also set apart, for the use of herself and children, a sufficient amount of the household furniture. The provision set apart for the family shall in no event be less than the sum of one hundred dollars;

and, if it shall appear upon a just appraisal of the estate that it does not exceed in value the sum of five hundred dollars, it shall be the duty of the appraisers to set apart the whole of said estate for the support and maintenance of such widow and child or children, or, if no surviving widow, to the lawful guardian of the child or children, for their benefit."

It is thus shown:

(a). To be "among the necessary expenses of administration."

(b). To be a **debt**, for it is "to be preferred before all other debts except as otherwise specially provided:"

(c). The decedent must leave "**an estate** solvent or insolvent."

(d). It must be set apart "from **the estate**."

(e). If "**the estate**" does not exceed in value the sum of five hundred dollars," "the whole of said **estate**" shall be set apart.

Section 4000 of said Code is as follows:

"In the payment of the **debts** of a decedent they shall rank in priority in the following order:

1. Year's support for the family."

This is further confirmation that "year's support" is a debt to be paid from the **estate** of the decedent; cannot exist without such **estate**; and is not otherwise a right or estate, inchoate or perfect, in favor of any person or in or against any property.

It is true that it has been held that a "year's support" is not such a debt of the intestate as to make one, who is not the legal representative, an executor **de son tort** by reason of paying the same, yet for all practical purposes it is a debt as described in the statute.

Barron v. Burney, 38 Ga. 264.

"The provision for year's support is a branch of the statute of distributions."

Farris v. Battle, 80 Ga. 189. (near top of page.)

Swain v. Stewart, 98 Ga. 367 (bottom of page.)

But the statute of distributions can have no application unless the decedent left an estate.

OWNERSHIP OF PROPERTY BY HUSBAND AND FATHER AT DATE OF DEATH ESSENTIAL TO YEAR'S SUPPORT.

"S, by deed, conveyed to G all his personal property in trust; first to pay all the creditors of S, and then to pay the surplus to the sisters of S; G took possession in the life time of S, and after his death was proceeding to execute said trusts, when the widow of S, having notified his administrator of her claim of her year's support out of said property, said administrator filed a bill, praying that G be enjoined from disposing of the property, and that the same be delivered to him as administrator. **Held** that S having, by said deed, parted absolutely with said property, his widow had no claim upon it, and the injunction was properly refused."

Summerford, Admr., v. Gilbert, 37 Ga. 59;

To the same effect see Hill v. Hill, 81 Ga., 516.

"The statute making provision for the setting apart of this allowance (Year's support) expressly provides that it shall be made from the estate of the deceased, and if, before his death, the deceased parted with his title to property, it can no longer be considered his estate."

Burkhalter v. Planter's Bank, 100 Ga., 431.

"On the death of a partner, the title to the personal assets of the firm is cast upon the survivor, who is charged with the administration of the same, first for the payment of the partnership debts, and secondly for paying over the deceased partner's share in the surplus to his legal representatives. Unless there is a surplus, none of the assets constitute any part of the estate of the deceased and consequently they are not chargeable with the year's support allowed to his widow. That a sum of money, without specifying any fund from which it is to be raised, has been set apart to her by the ordinary in the method prescribed in section 2571 of the code, will not entitle her to recover it or any part of it from the surviving partner after he has duly administered all the assets by applying them to the partnership debts."

Sellers v. Shore, 89 Ga., 416.

See Also: Ferris v. Van Ingen, 110 Ga. 102 (4).

Wood v. Brown, 121 Ga., 471 (2).

American Surety Co., v. Wood, 2 Ga., App. 641 (2-3).

The latest decision of the Supreme Court of Georgia, on this question is in the case of *Whately v. Watters*, 136 Ga. 701, where, after deciding that the equity in land conveyed to secure an indebtedness can be set apart as a year's support the Court says:

"The appraisers set apart the land, subject to a loan deed. It does not appear who was the creditor secured by the loan deed; the plaintiff in error was not that creditor. The year's support judgment took effect upon all the interest which the decedent had in the property after the satisfaction of the loan deed. That interest was an equitable estate; but an equitable estate is property, and a widow is not to be denied a year's support solely because her late husband's

estate was equitable in character. Let it be borne in mind, however, that we are not holding that a widow's right to a year's support in land is superior to the claim of her husband's creditor who holds the title to the land. There is no antagonism between the year's support and the creditor who is secured by the loan deed. If the decedent's equity is property subject to be applied to the payment of the unsecured debts of the decedent, certainly it is property which may be assigned to his widow and minor children as a year's support."

Was Mr. Dicks seized and possessed at the time of his death of the property out of which this year's support was set aside?

Did he leave an estate of which the property set apart as a year's support constituted a part?

Could his legal representative have taken from the trustee in bankruptcy this money for the purpose of paying debts created or arising subsequent to his adjudication as a bankrupt?

These must all be answered in negative.

"The trustee of the estate of a bankrupt upon his appointment and qualification . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, except in so far as it is to property which is exempt, to all . . . (5) property which prior to the filing of the operation, he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Section 70 (a) Bankrupt Act.

Upon appointment and qualification of the trustee the date of the adjudication becomes the date of

the cleavage between the old and new estate of the bankrupt. The bankrupt cannot bind any assets belonging to him prior to that date (Remington on Bankruptcy, Section 1117), nor can the trustee claim any assets acquired by him after that date (Remington, Section 1130).

Upon adjudication, in general, all power of inchoate rights to become consummated or vested rights ceases; save and except to dower rights which constitute, in law, actual though inchoate interests in land, and which are specially excepted by Section 8."

Remington, Section 1117.

If this right to year's support existed for one day after adjudication it existed for all time, and no sale nor distribution by the trustee would destroy it, for it is neither the sale nor distribution that deprives the bankrupt of the title. How then are purchasers or distributees to be protected if this date of cleavage is not enforced?

In the opinion of the District Court it is conceded that at the time of his death Mr. Dicks was not seized and possessed of the property out of which was set apart the year's support, the language of Judge Speer being (198 Fed. Rep. pp 295-6): "Here, it is true: the deceased did not die actually seized and possessed of the values set apart for the year's support." but he adds: "A statutory, but not an unqualified, title to this had vested in the trustee." Why a statutory title cannot be an unqualified one I do not know. A sale under a judgment or by a receiver or divesting of title by condemnation or by partition are all in the nature of statutory divesting of title or certainly do not require the acquiescence of the person whose title is divested; and yet there is no question that an unqualified title may thus pass.

It is true that Mr. Dicks had a right, while living, to an exemption, and also a right to endeavor to effect a composition with his creditors. It is true also that, if he had sought such exemption while living, the exemption so sought would have remained a part of his estate, and could have been set apart for a year's support.

Section 70 (a) of Bankrupt Act;

In Re: Seabolt, 8 A. B. R., 57,—113 Fed. (D. C. N. C.)

The necessity for the statutory provision that the title to exempt property should **not** pass to the trustee upon adjudication, but remain the estate of the bankrupt, is conclusive that the title to all other property did pass.

Adjudication under the present bankrupt act is equivalent to assignment by the bankrupt under the law of 1867, Remington, Section 1112.

If the right to exemption and the right to effect a composition be an estate left in the bankrupt, the year's support could, if the necessary steps had been taken, be set aside out of these two items. But Mr. Dicks made no application for an exemption and the trustee could not set it aside.

In re: Nunn, 2 A. B. R. 664.

And this year's support is not claimed to have been set apart from property that could have been claimed as exempt.

SECTION 8 OF THE BANKRUPT ACT CON- STRUED

Section 8 of the Bankrupt Act does not give any

right to a year's support, but simply provides "that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence."

But, it is argued that, if this section is not to have the effect of enabling the widow and minor children to obtain the year's support when the husband and father dies after adjudication, there was no need for its enactment, and it can have no field for its operation. On the **contrary**, there was a reason for its enactment, and there is a broad field for its operation without such interpretation.

Under the bankruptcy act of 1867 the suit abated upon the death of the bankrupt before adjudication, (Re: McKenzie, 15 A. B. R., 684). But, if the death was after adjudication, the suit did not abate (Frazier v. McDonald, Fed Cas., 5073; Re: Litchfield, Fed Cas., 8385). There was no need, therefore, for a provision in the present act declaring the effect of the death of the bankrupt **after** adjudication. The suit was then completed and could not abate; the judgment had been obtained, and the only matter left was the distribution of the assets by the trustee to which proceeding the bankrupt was no party. The law as to this condition was fixed by the above decisions. But there was a need for providing against abatement by death or insanity occurring during the period between the filing of the petition and the adjudication, which, as is well known to all practitioners in bankruptcy, may extend over many months.

"Death" in the body of this section and in the proviso clearly refers to the same period, viz.: between the filing of the petition and the adjudication, or, in other words, before final judgment. The proviso in this section was unnecessary, and was inserted merely to remove all doubt.

It is urged that it was the purpose of section 8 of the Bankrupt Act to protect the widow and children from being deprived of anything by reason of such Act, that they would not otherwise lose by the administration of the property of the husband and father for the purpose of payment of his debts. Grant that this be true; it does not sustain the contention that the year's support should be allowed when the husband and father dies after adjudication. If the property had been subjected and sold under an execution, it surely would not be contended that a year's support could be allowed out of the property thus sold before the death of the debtor. The same result follows when the title is divested by deed of assignment, equitable proceedings, or bankruptcy, before the death of the debtor. No title at time of death; no year's support.

Again it is urged, that the purpose of this section was to make affirmative provision for "dower and allowance." The most cursory reading must show that this is untenable. It provides neither dower nor allowance; it merely leaves the State laws unaffected. If the State has provided no allowance, none can be obtained in the bankrupt court; if the State laws, as construed by its Supreme Court, have provided that an essential to the allowance is title in the debtor at the date of his death, the Bankrupt Court cannot alter or disregard them. The State, and the State alone establishes the relationship and rights of the widow and children of an insolvent debtor as against the property formerly belonging to him. Sympathy cannot change this. It may be that the creditor is needy and the widow and children affluent, when we are pleased that the law affords aid where most needed; or it may be that without this the widow and children will be in utter poverty, and then we grieve.

But, as Justice Harris said in the above case of *Summerford v. Gilbert*, 37 Ga., 59.:

"If Sullivan dies insolvent, it is one of the common accidents of life, to be borne without looking for relief to the courts who have no authority to make laws for hard cases, but only to interpret and apply laws as they exist."

DECISIONS

The most thorough, logical, and convincing discussion of this question that I have been able to find is that in *Re: McKenzie*, 15 A. B. R., 679; 142 Fed., 383. In this case every aspect seems to have been considered, and the clear distinction between the dower right as it existed in the common law and exists in most States, though not in Georgia, and the allowance for a year's support is made, and thus is cleared up some of the misleading decisions which deal only with dower. For a further discussion, in which all of the cases that have been decided are considered reference is made to Sections 99 and 1167 *Remington on Bankruptcy*.

In *Re. Seabolt*, 8 A. B. R., 57; 113 Fed., 766, the bankrupt died **prior** to the adjudication, and of course that decision is of no authority in the present case, because it is not contended here that, if Mr. Dicks had died **prior** to the adjudication, there would be any doubt as to his widow and minor children being entitled to a year's support.

In *re. Parschen*, 9, A. B. R., 389; 119 Fed., 976; and in *Re. Newton*, 10 A. B. R., 345; 122 Fed., 103, it does not appear as to whether the bankrupt died **before** or **after** the adjudication.

DIFFERENCE BETWEEN DOWER AND ALLOWANCE

The following quotation from Collier on Bankruptcy (8th edition, p. 195) is made by Judge Speer (p. 294).

"The proviso protects all the rights, dower and otherwise, granted to the widow and children under State statutes. The clause is a new enactment, but it does not change existing laws. The doctrine rests on the principle that the trustee's title is charged with the same liens and burdens, whether actual or inchoate, as was the bankrupt's. It is not material that the husband died after the vesting of the title in the trustee."

Dower and not allowance was evidently in the author's mind when this was written. See cases cited. The only case cited to sustain the last sentence is that of *In Re. Slack* (D. C. Vt.), 7 Amer. B. R., 121, 111—Fed.—523. An examination of that case discloses that it affected only a dower right, or, what is there termed, "an enlarged right of dower". It is recognized universally that dower is an actual though inchoate right, but that a year's support is not an actual right prior to the death of the husband leaving an estate, nor does it have any lien upon the estate.

The decisions in reference to dower are not illuminating of this subject. If the dower right of other States were the same as in Georgia they would be, because with us the dower right applies only to the land of which the husband dies seized and possessed, while at common law and in all of the other States, except Connecticut, Mississippi, North Caro-

lina Tennessee, Vermont, New Hampshire, Delaware, and Florida, it is an actual though inchoate right in all of the land ever owned by the husband, unless the wife has by her act divested herself thereof. No further citation of authority need be made on this view than by reference to the McKenzie case, 142 Fed., 386. The dower in personality in Arkansas is similar to our year's support, while the dower in land is that at common law.


POLICY OF THE LAW

Ready acquiescence is found in the wisdom of the "benevolent public policy" (p. 295), so eloquently and exquisitely portrayed by the District Judge, and it is recognized that this right of year's support has been "dear to the law" (p. 296) for many years; but it is respectfully submitted that the limit of this protective policy has been reached when whatever estate which the husband and father may have left is to be first devoted to the support of the widow and minor children; however many just debts may be left unpaid. Let it not be forgotten also, that the Supreme Court of Georgia, since 1867 (37 Ga. 59) until 1911 (136 Ga. 701) has uninterruptedly held that when the husband and father died without the title being in him there could be no year's support.

The Legislature and not the Courts is to fix the "benevolent public policy," and when it has limited the source of this charitable provision to the estate of the deceased husband and father the courts cannot go further and make the property of other persons contribute. The law is their goal and the bounds of their duty, and, when ascertained, should be willingly and certainly enforced even though attended with anguished sympathy at the suffering dis-

closed. They are to "administer justice without respect to persons, and do equal right to the poor and to the rich." So doing they may hope to be "on the side of the angels," for thereby they administer the divine attribute of justice and bring to the highest attainable perfection the law, which "Has God for its author, the universe for its kingdom, and order and harmony and truth and justice for its objects."

Respectfully submitted,

 WM. H. BARRETT,

P. O. Augusta, Ga.

Attorney for Appellant.

Office Supreme Court, U. S.

FILED

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JAMES D. MAHER

CLERK

SUPREME COURT OF UNITED STATES

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No. 78

JAMES M. HULL, JR., Trustee,

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MRS. M. J. DICKS.

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**BRIEF OF B. B. McCOWEN, FOR MRS. M. J.
DICKS, RESPONDENT, IN FURTHER
ANSWER OF PLAINTIFF'S BRIEF
AND ARGUMENT.**



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Section No. 8 of the Bankrupt Act provides as follows:

"The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and conclude in the same manner as far as possible, as though he had not died or become insane; provided (further), that in case of death, the widow and children shall be entitled to the rights of dower and allowances

fixed by the laws of the State of the bankrupt's resident."

Under Section No. 64-a, of the Bankrupt Act: "It is required that the Court order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, County, District or Municipality, in advance of the payment of dividends to creditors, and upon filing the receipts with the proper public officers for such payment, he shall be credited with the amount thereof;" And under Section No. 64-b, Paragraph 4, "The Act requires that the wages due workmen, clerks, traveling salesmen or servants, which have been earned within three months of the date of the commencement of proceedings, etc., to be paid."

Paragraph 5, of Section No. 64-b adds, "And debts owing to any person, who by the laws of the State or the United States is entitled to priority, and it has been held in many cases, that without the necessity for specific exceptions in the Bankruptcy Act, that priority existed, where usually allowed under State laws, such for instance, as a claim for material supplied to a corporation, being entitled to priority under the laws of Kentucky has been held to be entitled to priority under the Bankrupt Act, although a technical lien had not ripened at the date of the corporation's adjudication in bankruptcy." See *In re Bennett, Trustee, etc.*, (C. C. A. 6th Cir.) 18 Am. B. R. 320, 153, Fed. 673.

"Now under the law of Georgia, a year's support stands as a claim against the bankrupt's estate ahead of even taxes of the State."

Under Section No. 4000 of the Code of Georgia, we find the following:

Priority of Debts. "In the payment of the debts of

a decedant they shall run in priority in the following order:

1. Year's support of the family.
2. Funeral expenses to correspond with the circumstances of the deceased in life, including the physician's bill and expenses of the last sickness. If the estate is solvent, it is authorized to provide a suitable protection for the grave.
3. The necessary expenses of administration.
4. Unpaid taxes or other debts due the State or the United States.
5. Debts due by the deceased, as executor, administrator, etc."

"So it will thus be seen, that under the law of Georgia, a year's support for the family goes first even before taxes and before at least eight other classifications of liabilities."

Mr. Collier on Bankruptcy in his 9th Edition, Page No. 996, in discussing Section No. 70-e, says, "It is well settled that the trustee takes not as a purchaser, but subject to all valid claims, liens and equities." The validity of such claims, liens and equities is to be determined in the application of Federal statutes according to the local law, as evidenced by the decisions of the State Courts." Thus he has no better title than the bankrupt had, and is affected with every equity, which would affect the bankrupt himself, if he were authorizing the same rights and interest. "A trustee in bankruptcy stands in the shoes of the bankrupt, etc., and he cites authorities, numbers of cases to be found in the foot notes of his treatise on Bankruptcy, 9th Edition, Page No. 996: And in the case *Thompson vs. Fairbanks*, 13 Am. B. R. 427 to 445, 126 U. S. 516, "It is held that the trustee takes the property of the bankrupt in the same

plight and condition that the bankrupt himself held, and subject to all the equities impressed upon it in the hands of the bankrupt." And in the case of Zartman vs. First National Bank, 216 U. S., 134, "It is held that a trustee takes not as a bona fide purchaser, for value, but as the bankrupt held the property, subject to all valid claims, liens and equities."

Mr. Justice Peckman speaking for the Supreme Court, in Security Warehouse Company vs. Hand, 206, U. S. 415, said, "It is no new doctrine that the assignee and trustee stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the Bankrupt Act, is subject to all the equities impressed upon it, in the hands of the bankrupt."

The decision in this case was reaffirmed by this Honorable Court in the Case of Standard Telephone & Electric Company, 216, U. S. 545, and reiterates the principal, "That the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands is subject to the equities impressed upon it while in the hands of the bankrupt."

In the further discussion by Mr. Collier in his treatise of the Bankrupt Act, on Page No. 1009, 9th Edition, Paragraph 6th, in discussing Section No. 70-a, says as follows:

Dower Courtesy Rights. "Here also the State law controls, it is the general rule, that if the doweress is bankrupt and her estate is vested, the trustee takes her interest; conversely, if her interest is still inchoate, it does not pass." "Where, however, the husband, not the wife is the bankrupt, her, inchoate interest is in most States sufficiently vested to endure, and the husband's title passes to the trustee, subject thereto; if the husband dies after his bankruptcy, she is entitled to the same interest she would have taken had he died before it."

P.O.

B. B. McLowry

Dec 9 1910

With Love Respect

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BRIEF OF B. B. McCOWEN, FOR MRS. M. J.

DICKS, RESPONDENT.

The Circuit Court of Appeals in its Certificate to this Court makes so clear the issue, that I deem it unnecessary to make further statement of the case, except that in so far as the statement second (2nd), page one (1) of the Certificate recites that "The statutory requirements were complied with in this proceeding, including the publication of citation **BUT** said Trustee was not made a party thereto," the latter part of said statement "but said Trustee not having been made a party was yet open, when as a matter of fact, that one question is now **RES ADJUDICA**, the referee in bankruptcy having in the original instance ruled that, that point

not having been made before him at the proper time and manner, would not be considered, from which decision no appeal has ever been taken.

L. K. Dicks was adjudicated a bankrupt. He died shortly thereafter, and after his Trustee had been elected and qualified, but before the property comprising his estate had been sold. His widow, Mrs. M. J. Dicks, made application to the Ordinary of Richmond County (the County of her residence), to have a year's support set aside for herself and four minor children under the Provisions of Section 4041 of the Code of Georgia of 1911. Appraisers were duly appointed, and reported setting aside the sum of \$2,500, to be paid out of the money or property in the hands of the Trustee in Bankruptcy. Application was thereupon made to the Referee for an order directing the Trustee to pay to the widow this sum. The Trustee resisted the application. The Referee sustained the contention of the Trustee, and denied the petition of the widow, but was reversed by his Hon. Judge Speer, from whose decision the Trustee appealed to the 5th Circuit Court of Appeals and the controversy is now before the Court on a Certificate from the Court of Appeals, for a decision as to whether the estate thus in the hands of a Trustee is chargeable under Section 8 and 70—a of the Act of 1898 of the Bankruptcy Act with such an allowance. Therefore the sole legal question to be considered as I understand the facts to be, and which are so well stated in the Certificate of the Court, page 2 of the original record filed Dec. 18, 1912, is as to: the character of title acquired by the Trustee under the Sections 70 (a) and 8 Bankruptcy Act:—as it relates to the law of Georgia, and the claims of Creditors. "Year's support is among the necessary expenses of administration" and since Section 8, of the Bankrupt Act,"—"the death or insanity of a bankrupt shall not abate the proceedings, but

the same shall be conducted and concluded in the same manner as far as possible, as though he had not died or become insane." Provided that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the Bankrupt's residence."

The case does not **abate**, but the Trustee being already the representative of the estate and holding the property for the benefit of all persons concerned, practically becomes the **Administrator**.—their duties being so analogous as to practically eliminate any means of distinction.

Section 8 of the Bankrupt Act and Section 70 (a) of the Act must be construed together for either of them to be properly interpreted.

Petitioner's Counsel hertofore anticipated the argument of respondent as follows: "But, it is suggested that, if this section is not to have the effect of enabling the widow and minor children to obtain the year's support when the husband and father dies after adjudication, there is no need for its enactment, and it can have no field for its operation and attempts to set forth a "broad field" for its operation, but does not do so.

Under the common law rule of most States, and notably the State of South Carolina, a wife is entitled to her dower out of all realty, if owned by her husband during coverture and of which he was at any time seized, unless that right has been waived; therefore the husband nor the **Trustee in Bankruptcy** of his estate could **without** this law have divested her of the right to sue and recover of the purchaser her interest whenever it should mature by the **Death** of the husband. So Section 8 of the Bankruptcy Act could have been worth nothing as to saving of **dower** to a wife, in that state,—but

Counsel for petitioner says that there is a time "frequently of months" between the filing of a petition against the bankrupt and before he is so declared,"—"and that this law" is intended to protect that class,—but respondent would respectfully call attention of the Court to the fact that there are a large number of voluntary petitioners in bankruptcy, who are immediately declared bankrupts, who might nevertheless die even before the appointing of a Trustee for his estate,—would it be contended by counsel for petitioner that under the present law that kind of a case would abate? and if it did not abate would they not stand on exactly the same footing as in this case even though a Trustee had not been appointed? (and Trustees are not always appointed) as soon as the party is adjudged a bankrupt, would the wife and children be deprived of their **year's support** not to mention dower?—which under the common law she could not have been divested of by any power,—her rights therein **ripening** however only with the death of her husband, and only **estimated** by some authorities in adjustment of the same, prior to the death of the husband. So it would seem impossible to credit the law making power with having enacted into law Section 8 without interpreting Section 70 (a) to mean that the Trustee, would hold the property **subject to all debts** and liabilities of which, ranking **highest** under the **Georgia law**, is that of a **year's support** for the wife and minor children.

In re Thomas vs. Woods, A. B. R. 23, page 141 the Court held as follows: "In o'r judgement it would be beyond the constitutional power of Congress to provide that in case of bankruptcy, the dower rights of the bankrupts wife as defined by the laws of the several States ceased, and the real property owned by him passed to his Trustee in bankruptcy discharged from such right of dower."

And in the same case page, 143 "the Court reasoned as follows: It must be conceded therefore that the right exists unless it has been taken away by the bankrupt act. But determining whether that has happened we ought to look first at the general scheme of that statute. The most conspicuous feature of the present bankruptcy act, is a clear purpose to save to the bankrupt and his family **every** right possessed by them, under the laws of the several State, and to grant to creditors no property or right, which would not have been theirs if the bankruptcy act had not been passed."

In the same case, page 144, it is stated by the

Court:—"It was manifestly the belief of Congress that in the absence of Section 8 the bankruptcy proceedings would abate in case of the bankrupt's death. The property of the estate in that event would pass to the present representatives of the bankrupt, to be administered according to local law. In such a contingency, the widows right of dower in real property, and the family's **allowance** out of the present estate would be complete, would become immediately vested and would take **priority** over the rights of creditors. Section 8 **prevents** the proceeding in bankruptcy from abating; **but** by the provisor Congress intended to save to the widow and children **all** that they would have obtained in case of its **abatement**."

Again on page 146 of the same case and by the same Court, which decided the McKinzie case referred to by petitioners counsel heretofore, conceded that the view of Judge Adams in his dissenting opinion in the McKinzie case had given the proper interpretation of the law in that case, and states that "that interpretation receives strong support from the foregoing facts."

Of all the cases cited by counsel for petitioner with reference to the loss of dower or year's support, it will

be seen are those in which the full title in the property had been transferred, and in such cases, of course, there will be nothing out of which to obtain the same—but does the Trustee hold title, other than for the purpose of properly distributing and **administering** the same? I think not, and we need no stronger authority than those submitted in the Circuit Court, and which have been so well reiterated by Judge Speer, in his opinion as follows:

The inquiry it seems must be determined by the relating portions of the Code of Georgia and of the Bankruptcy Act.

The law of Georgia providing allowances for the temporary support of families who have been bereaved by the death of the husband or the father, is found in Section 4041 of the Code. Under the title "Year's Support to Family," this provides:

"Among the necessary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided, is the provision for the support of the family to be ascertained as follows: Upon the death of any person, testate or intestate, leaving an estate solvent or insolvent, and leaving a widow, or a widow and minor child or children it shall be the duty of the ordinary, on the application of the widow to appoint five discreet appraisers; and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of twelve months from the date of administration to be estimated according to the circumstance and standing of the family previously to the death of the testator or

testate and keeping in view also the solvency of the estate . . . ”

The “Ordinary” in this State is the Probate Court. Section 8 of the Bankruptcy Act presents the relating statute:

“The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or became insane: Provided, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt’s residence.”

The questions raised on the finding of the Referee by this petition must be determined it seems by the proper interpretation to be placed upon these sections of the State and National Law. It is contended for the Trustee that since the “year’s support” in Georgia must be set aside “from the estate” of the deceased, that the latter having been divested of his property by the adjudication in bankruptcy, died without an estate from which the year’s support could be carved out. In support of this contention several Georgia cases are cited, where the deceased had made deeds of assignments of his property before his death. By these the Supreme Court of Georgia held that he had absolutely parted with all title, and the widow could make no claim as against such property for her statutory “year’s” support. The distinction, however, between an absolute sale and conveyance of title by the owner when in life, and the qualified divestiture of his title by operation of law seems quite plain.

Mr. Collier, in his useful treatise on the law of bankruptcy, (8th Edition p. 195), in discussing Section 8, quoted above, remarks:

"The proviso protects all the rights, dower and allowances otherwise, granted to the widow and children under State statutes. The clause is a new enactment, but it does not change existing law. The doctrine rests on the principle that the trustee's title is charged with the same liens and burdens, whether actual or inchoate as was the bankrupt's. It is not material that the husband died after the vesting of the title in the trustee."

In support of this statement the learned author cites in *re Slack*, III Fed. 523.

In that case, Judge Wheeler, in the district of Vermont, while enforcing the proviso of Section 8, observes:

"The estate of the bankrupt that the creditors are entitled to the benefit of, has gone to the Trustee for sale and distribution of the proceeds, but not for inheritance, or for distribution of the real estate itself. The bankrupt is not wholly disseised till the land is gone out of the estate."

This authority clearly distinguishes the question before the Court from the Georgia authorities above referred to.

In the case of *In re Newton*, 122, Fed. 103, may be found this clear and cogent statement by Judge Platt, of the district of Connecticut:

"Section 6 of the bankrupt act takes care of the bankrupt in certain respects while he lives. Section 8 continues the machinery of the court after his death or insanity, but proceeds with caution to offer to the widow and children of the bankrupt, who shall die or become insane after the proceedings have been instituted, the

fostering care of the federal tribunal just as far as the local tribunal had been authorized to go by its creator, the local legislature, and no further. If the proceedings were abated by the death or insanity of the bankrupt, it is clear that the probate court would have had ample authority to make the allowance. But the Congress says that they shall not abate, and in the same breath says that 'the widow and children shall be entitled to all rights of dower and allowance fixed by the law of the State.' "

We hold that the year's support of the family immediately succeeding the death of its head is an "allowance" of this character. It is an allowance singularly promotive of a benevolent public policy. To no period of the life of the family could the State more wisely and justly direct and apply its fostering care; in no other is the distress so poignant or the extremity so great. The provision of the Georgia law is then not only in harmony with the soundest public policy, but with the most tender and compassionate teachings of that holy religion which admonishes us to care for the "widow and fatherless in their affliction."

The authority in which learned counsel for the Trustee reposes his strongest reliance *In re McKenzie* 142 Fed. 383, et seq., a decision by the Circuit Court of Appeals of the Eighth Circuit. In that case, however the dower of the widow was involved. It was not even the dower at common law but it was the right of dower extended to the personal property by the statute of Arkansas. This provides, (Kirby's Digest Sec. 2708):

"A widow shall be entitled as part of her dower, in her own right, to one-third of the personal estate whereof the husband was seized or possessed "

Upon the construction of this statute, the Court, holding that the husband did not have actual seisin or possession of the personal assets claimed by the widow, held that her right must be denied.

The statute of Georgia granting the year's support does not use the words of rigid and long ascertained import adopted by Arkansas. It declares the year's support to be "among the necessary expenses of administration, and to be preferred before all other debts" and declares that for the widow and children, or children only, the Ordinary, through appraisers, shall set apart "either in property or money, a sufficiency from the estate for their support and maintenance for the space of twelve months from the date of administration." Here it is true the deceased did not die actually seised and possessed of the values set apart for the year's support; a statutory, but not an unqualified, title to this had vested in the trustee. But can it be denied that the bankrupt living, or his family when dead had an "estate" in the assets. While he lived he had the right to an exemption, he had the right to propose a composition with his creditors, which the court might have ratified, and directed the trustee to reconvey the assets to him. For many years the salutary rights of the wife and children in that estate had been fixed by law; for many years, and on many occasions, the supreme appellate court of the State had reiterated the doctrine that this right is one dear to the law. As early as *Cheney vs. Cheney*, 73 Ga. 66, 70, it had declared of the year's support:

"This court has always regarded such claims favorably, as will clearly appear from the following cases, to which many others, if necessary, might be added. 10 G. 37; 23Id. 235, 237; 55 Id. 361; 44 Id. 316 61 Id. 218, 221; 64 Id. 208, 221."

* The creditors then dealt with the party who became bankrupt with a full knowledge of the law, and the policy of the State. It is not conceivable that Congress could intend to annul a statute framed with such benignant philosophy and designed to afford sustenance to the wife and children of the dead. Nor does this view take into account the strong dissenting opinion of Circuit Judge Adams, filed *In re McKenzie* supra, which seems to have met with approval in many quarters.

To briefly restate our view of this question, the title of the debtor cast upon the trustee by the bankruptcy law is for distribution to pay the debts. It is not an absolute title. The rank and priority of the debts are almost without exception determined by the law of the state. By the law of Georgia the year's support is to be "preferred before all other debts," with certain exceptions not material here, and the year's support must be set apart either in property or money from the estate of the deceased. The year's support is then an inchoate lien, with few exceptions, superior to the claims of creditors.

Respectfully submitted,

B. B. McCOWEN,

Attorney for Respondent.

Augusta, Ga.

Thomas W Hardwick
of Counsel

HULL *v.* DICKS.CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT.

No. 78. Argued November 12, 1914.—Decided January 5, 1915.

Where a resident citizen of Georgia has been duly adjudicated a bankrupt and dies after such adjudication and after the appointment, qualification and partial administration of the trustee, the estate vested in the trustee under § 70 of the Bankruptcy Act of 1898 is chargeable under § 8 of that law with the allowance for a year's support of the widow and minor children as provided by § 4041 of the Georgia Code.

The Bankruptcy Act of 1898 makes no exception to the rule that after proceedings have been commenced they are not to be abated by death of the bankrupt; and, under the proviso in § 8, the right of the widow and children in case of such death to an allowance out of what remains in the hands of the trustee, is as broad as the prohibition against abatement.

What the court may do pending the life of the bankrupt is binding on the bankrupt; and, as to such property as has been distributed prior to his death, the right of the widow and children to charge it with support under a state statute is defeated. Such allowance can only be made out of property remaining in the hands of the trustee on an order duly made, in proceedings in which he, as representative of the creditors, has a right to be heard.

THE facts, which involve the construction of §§ 8 and 70 of the Bankruptcy Law of 1898 and § 4041 of the Georgia Code in regard to the allowance to be made for a year's support of the widow and children of a bankrupt dying during administration of the estate, are stated in the opinion.

Mr. William H. Barrett for Hull, trustee.

Mr. B. B. McCowen, with whom *Mr. Thomas W. Hardwick* was on the brief, for Mrs. Dicks.

MR. JUSTICE LAMAR delivered the opinion of the court.

In January, 1912, L. K. Dicks, a citizen and resident of Richmond County, Georgia, was adjudicated a bankrupt. James M. Hull, Jr., was elected Trustee and on February 5, 1912, took possession of all of the property of the bankrupt. Three weeks later L. K. Dicks died leaving a widow and four minor children. Thereafter the widow applied to the Court of Ordinary for the year's support to which the family was entitled by virtue of the provision in the Georgia Code (§ 4041) that "upon the death of any person . . . leaving an estate, solvent or insolvent . . . it shall be the duty of the Ordinary . . . to appoint . . . appraisers, . . . to set apart and assign to such widow and children . . . either in property or money, a sufficiency *from the estate* for their support and maintenance for the space of twelve months." . . .

Citation issued and thereafter the Ordinary duly set apart to the family a year's support to be made out of the estate of L. K. Dicks in the hands of the Trustee in Bankruptcy. The widow subsequently applied to the Referee for an order directing the Trustee to pay over the amount so set apart. Her application was denied and that ruling was reversed by the District Court. (198 Fed. Rep. 293.) The Trustee took the case to the Circuit Court of Appeals which certified to this court the following question:

"Where a resident citizen of Georgia has been duly adjudicated a bankrupt and dies after such adjudication and after the appointment, qualification and partial administration of the trustee, is the estate vested in the trustee under § 70 of the Bankruptcy Law of 1898 chargeable under § 8 of the same law, or otherwise, with the allowance for a year's support of the widow and minor children, as provided in the laws of Georgia?"

Counsel for the appellant contends that this question should be answered in the negative. He insists that § 8¹ of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 549, does not create a right but, as in this case, merely preserves the right, given by the state law, to have a year's support "out of the estate" left by the husband and father. It was then argued that as the title to the property had vested in the Trustee before the death of the bankrupt, Dicks did not die "leaving an estate" and there was, therefore, no estate out of which, under the Code of Georgia, the year's support could be set apart.

This reasoning would be applicable if the widow and children were asserting rights of inheritance under the Statute of Distribution. Moreover, there would be no answer to the argument advanced if the title, which vested in the Trustee, was in its nature like that which would have been acquired if Dicks in his lifetime had made a Deed of Assignment to the Trustee. But such is not the case. For construing the statute as a whole it will be seen that while § 70² (30 Stat. 565) of the Bankruptcy Act vested title in the Trustee primarily for the benefit of the creditors, there was an exception in favor of the bankrupt himself, and the transfer was also subject to a condition in favor of his family if he died before the

¹ "§ 8. Death or Insanity of Bankrupts.—a The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence."

² "§ 70. Title to Property.—a The trustee of the estate of a bankrupt, upon his appointment and qualification . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt,"

proceedings ended. If the Bankrupt elected to claim a homestead the exempt property, even though it had passed to the Trustee, would, after identification and appraisal, be turned back into his possession. *Chicago &c. R. R. v. Hall*, 229 U. S. 511, 515. The Trustee's title was also subject to the condition that if the bankrupt died during the pendency of the proceedings, the widow and children would be entitled to receive the allowance given them by the laws of the State of his residence. This latter limitation on the Trustee's title was in connection with legislation on the subject of abatement.

For the statute seems to assume that, in the absence of a statutory provision to the contrary, the death of the bankrupt would have abated the proceedings. In that event the property, although the title thereto had been previously vested in the Trustee, would have been surrendered to the bankrupt's personal representatives, who would then have been in possession of an *estate*, out of which, under the Georgia Code, a year's support could have been set apart to the widow and children. Congress need not have made any change in the general law but, as in the act of August 19, 1841, c. 9, 5 Stat. 440, could have allowed the suit to abate on the death of the bankrupt; Or, as in the act of March 2, 1867, c. 176, 14 Stat. 517, 522, § 12, it could have permitted without requiring, an abatement; Or, as in the act of April 4, 1800, c. 19, 2 Stat. 19, 27, § 19, it could have made a mandatory provision that the proceedings should continue if the bankrupt died "after commission sued out;" Or, it could have legislated, as in § 8 of the present statute (30 Stat. 549, § 8) where Congress went further than in any of the previous bankruptcy laws and made a universal and mandatory provision that "the death . . . of a bankrupt shall not abate the proceedings." That sweeping declaration, however, was coupled with the *Proviso* that "in case of death the widow and children shall be entitled to all

rights of dower and allowance fixed by the laws of the State of the bankrupt's residence."

Section 8 with these two clauses prevents, on the one hand, the loss and inconvenience to creditors resulting from an abatement,—while at the same time avoiding the hardship of depriving the widow and minor children of a right to which they would have been entitled, if the suit had abated on the death of the husband and father. The statute makes no exception or qualification—after the proceedings have been commenced they are not to be abated by death. And the *Proviso* clearly indicates an intention to make the preservation of the widow and children's right to the allowance as broad as the prohibition against the abatement of the suit. Inasmuch as the proceedings did not abate if the death of the bankrupt occurred after filing the petition and before the election of the Trustee, neither was the right to the allowance lost if the bankrupt died after such election and at a stage of the proceedings where the title had, by operation of law, vested in the Trustee. For such title, whenever it accrued, was subject to the condition that the assets, in the hands of the Trustee, should be charged with the payment of the allowance to which on the death of the bankrupt, the widow and children were entitled under the laws of the State of his residence.

It is claimed that, under this interpretation, if the bankrupt died after the Trustee had wholly or partially administered the estate the widow and children could still enforce their rights to a year's support out of the bankrupt estate, even if the property had passed into the hands of purchasers. But this loses sight of the fact that the family had nothing in the nature of a lien which, during his lifetime, prevented the bankrupt or the Trustee from disposing of his property. What was done by the court, while the bankrupt was in life and a party to the proceeding, was binding upon him, and therefore as effectual

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to defeat the right to a year's support out of such property as if the sale and distribution had been made by the bankrupt himself or by his duly authorized agent.

The right to the year's support accrued at the date of the bankrupt's death and could be enforced out of property remaining in the hands of the Trustee,—and then only after the allowance had been duly made in proceedings, where he, as representative of the creditors, had the right to be heard.

There has been some conflict in the decisions dealing with the subject [*In re McKenzie*, 142 Fed. Rep. 383, 384 (6); *In re Slack*, 111 Fed. Rep. 523; *In re Newton*, 122 Fed. Rep. 103; *In re Seabolt*, 113 Fed. Rep. 766, 767; *In re Parschen*, 119 Fed. Rep. 976; *Thomas v. Woods*, 173 Fed. Rep. 585, 586; vacated, 178 Fed. Rep. 1005], but the foregoing considerations require that the question of the Circuit Court of Appeals should be answered, Yes.

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